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Nos. 87-1045 and 87-1065

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

Supreme Court, U.S.
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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

RESPONDENT FRED KYLE'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Fred Kyle, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit, moves for leave to proceed in forma pauperis before this Court. Respondent did not seek leave to proceed in forma pauperis before the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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One of the Attorneys for
Respondent Fred Kyle

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, FRED KYLE, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed here without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to peetitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

February 1976: monthly wages were approximately $610.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **YES**

a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

$414/month in social security benefits; $132 a month in disability benefits from Veteran's Administration.

3. Do you own any cash or checking or savings account? **NO**

a. If the answer is yes, state the total value of the item owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other values property (excluding ordinary household furnishings and clothing)? **YES**

a. If the answer is yes, describe the property and state its approximate value.

My wife and I own the home we live in in Chicago, Illinois. The assessed value of the home is $17,500, and the estimated market value is approximately $40,000. However, the home is mortgaged with a mortgage through the Veteran's Administration; and we pay $187 monthly on the mortgage. The unexpired term of the mortgage is approximately 12 years.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

The following persons live with me and are dependent upon me for support: my wife; my three children, ages 18 years old and younger, and two small grandchildren.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

"OFFICIAL SEAL"
BENIYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 6/19/91

x Fred Kyle

FRED KYLE

Subscribed and Sworn before me this 11th day of February 1988.

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Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The parties to these proceedings are:

1. The Director, Office of Workers' Compensation Programs, United States Department of Labor, who is a petitioner in No. 87-1045, and a respondent in No. 87-1065.

2. Fred Kyle, who is a respondent in both No.87-1045 and in No.87-1065.

3. The National Council on Compensation Insurance ("NCCI"), who intervened in the court of appeals in proceedings to rehear the panel decision. NCCI is a petitioner in No. 87-1065.

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ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF
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BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

In No. 87-1045, the Director, while seeking a writ of certiorari to review the court of appeals' decision, does not seek plenary review of that ruling. He asks instead that his petition be held and disposed of as appropriate, in light of the disposition of Broyles v. Director, Office of Workers' Compesnation, 824 F. 2d 327 (4th Cir. 1987), pet. for cert. filed, 56 U.S.L.W. 3484 (U.S. December 29, 1987) (No. 87-1095) ("Broyles"). In No. 87-1065, NCCI does seek plenary review of the court of appeals' ruling, though three of the four questions it presents were not considered, much less resolved, by the panel. Respondent Fred Kyle accepts the Director's (but not NCII's) Statement. See Director's Pet. at 2-8.

The question of which the Director seeks review in No. 87-

1045 is identical to the one of which he seeks review in Broyles. Compare Director's Pet. at (I) with Director's Pet. at (I) in Broyles . (Both presenting question of whether Section 402 (f)(2) of Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), obliges the Director to aply the interim presumption in 20 C.F.R. § 410.490 to certain black lung claimants with less than 10 yers of demonstrated coal mine work.) Moreoever, this same question (the "Section 402(f)(2) question"), is incorporated, in substance, by one of the questions already accepted for review in Sebben v. Brock, 815 F. 2d 475 (8th Cir. 1987), pet. for cert. granted, 56 U.S.L.W. 3568 (February 22, 1988) (Nos. 87-821 & 87-827) ("Sebben"), albeit on the petition of the Pittston Coal Group et al ("Pittston"), rather than the Secretary of Labor (the "Secretary") or the Director [1]. See Brief of Respondents in Opposition ("Op. Cert. Br.") in Broyles at 4-5. (Explaining the overlap). Therefore, respondent submits that the petitions the Director (in No. 87-1045) and NCII (in 87-1065) have filed should both be held and disposed of in light of this Court's decision in Sebben, or, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well. [2]

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[1]. There were two petitions filed in Sebben. In No. 87-821, Pittston filed a petition raising four questions, one of which, as noted in the text, incorporated the Section 402(f)(2) question the Director presents here. In No. 87-827, the Secretary of Labor presented only a single question, one relating to the appropriateness of the mandamus relief the court of appeals in Sebben ordered for the black lung claimants there. Plainly, the Secretary did not regard the Section 402(f)(2) question as one properly presented for plenary review by Sebben, where, among other factors apparently obliging that conclusion, the court of appeals never considered the issue.

[2] Respondent here joins the Broyles respondents in urging this Court to grant certiorari in Broyles without further delay, to review the substantive Section 402(f)(2) question in that case. See Op. Cert. Br. in Broyles.

ARGUMENT

A. The Director submitted his petitions here and in Broyles after the Secretary submitted her petition in Sebben, but before this Court's February 22, 1988 order granting review in Sebben. The Solicitor General's position in the three petitions was that this Court should grant plenary review only of the court of appeals' decision in Broyles. Director's Pet. at 8-9; Secretary's Pet. in Sebben at 16-18. He therefore urged that the petition here "be held and disposed of as appropriate in light of...Broyles." Director's Pet. at 9. Similarly, he urged in his Sebben petition that the Secretary's petition there be held pending disposition of this case, since the remedial questions properly presented in Sebben would not have to be addressed at all, if the Section 402(f)(2) question in Broyles were resolved favorably to the Secretary in Broyles. Secretary's Pet. in Sebben at 16-18.

We agree with the Solicitor General that, as this case and Broyles present an identical issue, they should be disposed of together, and alike. This Court's decision to consider the Section 402(f)(2) question in Sebben, however, obviously diminishes the liklihood that it will review this question in Broyles, as the Solicitor General recommended. Put differently, it now appears as if the Broyles petition may be held for disposition in light of the ruling in Sebben, in accordance with the Court's usual practice when a pending petition for certiorari presents a question accepted for review in another case, see e.g., Keney v. New York, 388 U.S. 490 (1967). Whether the Court chooses to so hold Broyles, or grants certiorari in that case, as respondents there urge in their Op. Cert. Brief, the petition here should be held, and disposed of as appropriate in light of this Court's resolution of the Section 402(f)(2) question in Sebben and/or Broyles.

B. NCCI's petition in No. 87-1065 should also be held and disposed of in light of the Court's rulings in Sebben, and, if certiorari is granted in Broyles, in light of its decision in that case as well. Plenary review is completely unwarranted.

1. NCCI was not even a party to this litigation until after the court of appeals' decision here. It is able to style itself a petitioner only because the court of appeals granted its "Motion for Leave to Intervene and to File a Petition for Rehearing" which it filed in that court on June 24, 1987, five weeks after the panel's ruling. Whether the order allowing intervention was correct is very questionable, on a number of grounds. Even an assumption that the order was correct, however, does not obscure the fact that NCCI'S involvement with this litigation came late and was then limited, following as it did the very ruling it now seeks to overturn. A "party" whose procedural involvement in litigation is so attenuated should be permitted to secure plenary review by this Court only upon a showing that a principal party--here the Director--will not adequately represent its interests, See generally, R. Stern, G.Gressman, S. Shapiro, SUPREME COURT PRACTICE (6th ed. 1986), § 14.5. Cf., SUP CT. 38.4 (Providing that court will ordinarily hear oral argument from only one counsel on each side; divided argument not favored.) But with respect to the Section 402(f)(2) question, which is the only question that the court of appeals' ruling here properly presents, NCCI makes no such showing. See §B.3, infra.

2. NCCI's attenuated procedural involvement in this litigation, see ¶ B.1, supra, is matched by its attenuated substantive interest. NCCI describes itself as a "nonprofit, voluntary association of insurance companies, insuring and reinsuring workmen's compensation policies." NCCI Pet. at ii.

But insurance companies are never parties to administrative proceedings on any claims for black lung benefits. See, 30 U.S.C. §§ 932,934; 26 U.S.C. §§ 4121(a), 9501. Either a coal operator, or the Secretary of Labor himself, by the Director, is the claimant's adversary. Id. Respondent's last coal mine employment, moreover, was before January 1, 1970, and thus there is no "responsible coal mine operator," for his claim (i.e. an operator who could be required to pay any benefits owed). Administrative Law Judge Decision at Director's Pet. pp 15a-16a. Accordingly, the Director was, and is, the lone opponent of Mr. Kyle's claim, and the party responsible for the payment of any benefits due Mr. Kyle, out of federal funds. 30 U.S.C. § 932; 26 U.S.C. § 9501(d). Thus, not even any coal operator that NCCI's member companies insure has an identifiable financial interest in the outcome of respondent's claim. Much less does NCCI. Even a party whose party "status" is unclouded should have to show a more substantial interest than that, to invoke the discretionary exercise of this Court's jurisdiction. See, The Monrosa v. Carbon Black Export, Inc. 359 U.S. 180, 183-84 (1959). Put differently, if plenary review is to be granted here, it should be at the behest of someone with a direct and substantial interest in the litigation. Here that someone is the Director, not NCCI.

3. In its petition, NCCI seeks review of four questions. NCCI Pet. at i. The first question is, in substance, the Section 402(f)(2) question that the court of appeals below addressed, but which this Court has now decided to review in Sebben. See § A. supra. In this context, however, NCCI can offer no presentable argument why the petitioners in Sebben (the Secretary of Labor and Pittston), or, if this Court decides to grant the petition in Broyles, the petitioner there (the Director) will not perfectly well represent whatever interest they have in the resolution of that question. Accordingly, there

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should be no occasion to grant NCCI's petition to allow it to also brief and argue this question to the Court. Its prospective resolution in Sebben, and possibly Broyles, makes it appropriate to hold the petition pending the decisions in one or both of those cases.

The three other questions of which NCCI seeks review reflect its attenuated involvement in this case. These three questions are all ones the court of appeals never decided, and the Director does not present in No. 87-1045. Indeed, none are questions any party even presented to the panel here, prior to its ruling. Moreover, we know of no appellate court that has ever squarely addressed, much less accepted, any of the ambitious contentions these questions carry with them. See NCCI Pet. at 14-17.[3]

This court does not ordinarily consider questions not specifically considered and passed upon by the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976), Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970), Delta Airlines v. August, 450 U.S. 346,362 (1981) (question presented in petition but not to court of appeals will not be reviewed). Such a rule is to be disregarded only in exceptional cases. See, Stone v. Powell, 428 U.S. 465, 481 n. 15 (1976). NCCI does not explain why this is such a case. Plenary review of any of these questions is therefore unwarranted. At the same time, one of these three questions (Question Presented No. 2 at NCCI Pet. p. i) is similar to a second question taken for review in Sebben. Compare Question Presented No. 2 in No. 87-1065 with Question Presented No. 3 in No. 87-821 (Whether judicial application of 20 C.F.R. § 410. 490 to some black lung claims violates federal

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[3] Under these circumstances, we see no reason to burden this Court by here addressing any of these contentions.

Admnistrative Procedure Act.). NCCI's petition is therefore appropriately held for resolution of this question in Sebben, for substantially the same reasons as it is appropriately held for resolution of the Section 402(f)(2) question in the same case, and possibly Broyles as well.

CONCLUSION

The petitions for writs of certiorari in Nos. 87-1045 and 87-1065 should both be held and disposed of as appropriate in light of the Court's decision in Sebben, and, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well.

Respectfully submitted,

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March 1988

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